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THE INTERNATIONAL CRIMINAL COURT: HISTORY, DEVELOPMENT AND STATUS

J. Holmes Armstead, Jr.*

The International Legal Community is looking forward to the inauguration of the International Criminal Court ("ICC") in late 1998.¹ Unlike the International Court of Justice, which exists to decide disputes between countries, the ICC would hold individuals criminally liable for certain crimes that were not punished in national courts.² A permanent court that would hear cases of international criminal law has been widely discussed by scholars for over a century, and seriously debated among nation-states since the conclusion of the World War One.³ "The concept of an international criminal court, having its own super-national criminal power goes back to the era of the League of Nations, a time of quite naïve faith in the omnipotence of the force of law and effusive enthusiasm regarding magnificent international projects."⁴ While much of that faith and enthusiasm has gone institutionally unrewarded over the years, some significant progress has occurred in providing international juridical institutions, albeit, ad hoc, to address grave breaches of international criminal law.⁵

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1. Conditional upon a vote of the United Nations ("UN") General Assembly scheduled for August 1998, the newly formed International Criminal Court will open in temporary quarters in Paris in November, 1998.

2. *The International Criminal Court* (visited Apr. 11, 1998) <<http://persoweb.francenet.fr/~intermed/uk/ijs.htm>>. This site contains the 1994 version of the Draft Statute for the ICC; however, this article provides the 1995 version. See *infra* Appendix A.

3. *Historical Survey on the Question of International Criminal Jurisdiction*, UN Doc. A/CN.4/7 (on file with author).

4. Hans-Heinrich Jescheck, *International Criminal Law; Its Object and Recent Developments*, in 1 *INTERNATIONAL CRIMINAL LAW* 49, 72 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

5. Examples include: the Nuremberg War Crimes Tribunal, 1945; the In-

During the peace negotiations at Versailles, 901 accused war criminals were to be indicted.⁶ However, in Leipzig, the German Supreme Court found only sixteen cases in which there was sufficient evidence to bring defendants to trial.⁷ Articles 227-230 of the Treaty of Versailles outlined requirements and procedures for the trial and punishment of war criminals,⁸ but numerous exceptions to these provisions were sought by Baron von Lersner, the German representative. In May 1921, the Leipzig trials⁹ resulted in only thirteen convictions that were ultimately handed down.¹⁰ Considering the large number of cases referred to the German authorities, this was an untenable result, particularly in light of the finding of the Commission of Inquiry,¹¹ which had been appointed by the Paris Peace Conference Delegates on January 25, 1919.¹² As part of the official report of that Commission to the Peace Conference, a list of thirty-two separate types of offenses were specified as violations of the "laws and customs of war."¹³ In attempting to define the jurisdictional aspects of

ternational Military Tribunal for the Far East, 1945; the U.S. Army Military Commission (Manila) Ad Hoc War Crime Tribunal for former Yugoslavia, 1989; and the International Criminal Tribunal for Rwanda, 1994. See, e.g., U.N. Security Council, 3453d mtg., U.N. S/RES/955 (1994) (resolution for the Rwanda tribunal).

6. Remigiusz Bierzanek, *The Prosecution of War Crimes*, in 1 INTERNATIONAL CRIMINAL LAW 559 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973)

7. *Id.* at 568.

8. *Id.* at 566.

9. *Id.* at 567.

10. *Id.* at 568.

11. *Id.* at 562.

12. Bierzanek, *supra* note 6, at 562.

13. *Id.* at 563-64. The following are violations of the "laws and customs of war:" (1) murders and massacres: systematic terrorism; (2) putting hostages to death; (3) torture of civilians; (4) deliberate starvation of civilians; (5) rape; (6) abduction of girls and women for the purpose of forced prostitution; (7) deportation of civilians; (8) internment of civilians under inhuman conditions; (9) forced labor of civilians under inhuman conditions; (10) usurpation of sovereignty during military operations; (11) compulsory enlistment of soldiers among the inhabitants of occupied territory; (12) attempts to denationalize the inhabitants of occupied territory; (13) pillage; (14) confiscation of property; (15) exaction of illegitimate or exorbitant contributions and requisitions; (16) debasement of currency and issue of spurious currency; (17) imposition of collective penalties; (18) wanton devastation and destruction of property; (19) deliberate bombardment of undefended places; (20) wanton destruction of religious, charitable, educational, and historic buildings and monuments; (21) destruction of merchant ships and passenger vessels without provision for the safety of passengers and crew; (22) destruction of fishing boats and relief ships; (23) deliberate bombardment of hospitals; (24) attack on and destruction of hospital ships (25) breach of other rules of the red cross; (26) use of deleteri-

international criminal law and refine substantive aspects of customary international law, the Versailles Peace Conference set a foundation for future international legal action and raised the expectations of the international community to punish transgressors.¹⁴

Thus, as a result of the ineffective response to the outcome of the World War One war crimes prosecutions, a permanent International Criminal Court was proposed in 1926.¹⁵ While criminal offenses of a military character have been long recognized in common law courts,¹⁶ an effective and consistent means of applying jurisdiction in the international sphere really did not exist until the allied powers,

“acting in the interests of all the United Nations,” signed the London Agreement of August 8, 1945, setting up an International Military Tribunal for the trial of war criminals of the European Axis whose offenses had no particular geographical location, defining the law it was to administer and laying down rules for the proper conduct of the trial.¹⁷

Jurisdiction of the Tribunal was ultimately expanded to include:

- (1) crimes against peace (planning preparation, initiation, or waging of a war of aggression; or a war in violation of international treaties, agreements, or assurances; or participation in a common conspiracy for the accomplishment of any of the foregoing),
- (2) war crimes (violations of the laws and customs of war) and
- (3) crimes against humanity (murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country were perpe-

ous and asphyxiating gases; (27) use of explosive or expanding bullets, and other inhuman appliances; (28) directions to give no quarter; (29) ill-treatment of wounded and prisoners of war; (30) employment of prisoners of war on unauthorized work; (31) misuse of flags of truce; and (32) poisonings of wells. *Id.*

14. *Id.* at 571.

15. *Id.*

16. *Ex parte Duke de Chateau Thierry*, 1 K.B. 552 (1917).

17. Bierzanek, *supra* note 6, at 575.

trated).¹⁸

Article V of the charter for the Tokyo Tribunal incorporated the above provisions without substantial revision.¹⁹ Thus, the Nuremburg and Tokyo War Crimes Tribunals resolved the preeminent international criminal law issues of the mid-twentieth century.²⁰ But of course as these tribunals addressed only a single conflict; the legal effect of the special jurisdiction of those Tribunals, and indeed in some quarters, the substantive rules applied therein, left the question of permanent and consistent application of the juridical principles established in some doubt.²¹ The "Nuremburg principles," as the law in this area has come to be called, primarily addresses armed conflict issues and does not presuppose the prescriptive intervention of other criminal conduct, such as piracy, narcotics trafficking, and white slavery; nor are they a systematic means of applying international (supernational) juridical power.²²

Some scholars would attack the War Crimes Tribunals as "victors justice"²³ and dismiss any theory of universality unless and until codification gave the international legal system greater specificity with regard to both procedure and substance.²⁴ As to substantive international law, the United Nations has undertaken numerous expansions to its Charter. The United Nations has passed special Resolutions and initiated several conventions which expand the "Nuremburg" principles and attempt to codify other outlawed behavior within the international community.²⁵ However, the structural development of a permanent court²⁶ has not moved forward with the same speed.²⁷ While scholars have argued for a permanent international criminal court since the 1920s the most recent large scale grave breeches of international criminal law have been addressed once again by ad hoc tribunals.²⁸

18. *Id.* at 576.

19. *Id.*

20. *Id.*

21. *Id.* at 577.

22. *Id.* at 578.

23. LAURENCE TAYLOR, A TRIAL OF GENERALS 225 (1981).

24. *Id.*

25. Bierzanek, *supra* note 6, at 578-586.

26. *Id.*

27. *Id.*

28. The ad hoc tribunals include the Ad hoc International Tribunal for International War Crimes in the former Yugoslavia and the Ad Hoc Tribunal for

The lack of a permanent criminal court and accompanying apparatus to investigate, apprehend and prosecute alleged violations has in part been responsible for the dismal state of international criminal prosecutions in Rwanda and the former Yugoslavia. Since 1989, the world community has become progressively more engaged in moving towards initiating a permanent criminal tribunal.²⁹

The United Nations appointed an Ad Hoc Committee of experts on the establishment of a permanent International Criminal Court which initiated its work April 3, 1995.³⁰ This committee began with its review of the International Commission of Jurists studies³¹ of draft codes and statutes to facilitate its work in structuring a court.³² The final draft is to be presented to the General Assembly for approval in August 1998 with a tentative date of October 1, 1998 set for the inauguration of the International Criminal Court at a temporary site in Paris.³³ The structure of the court provides for an independent judiciary of eighteen jurists, elected for a nine year term.³⁴ Considerable attention is paid in several articles to insure representation on the court of jurists with criminal trial experience³⁵ and international law³⁶ expertise, as well as being representative of the various world legal systems.³⁷ This apportioned representation on the court will hopefully provide sensitivity to take into account the international community's concern with issues of cultural relativism and geographic dispersion.

Safeguards for defendants' rights are enumerated,³⁸ including the presumption of innocence³⁹ that should be famil-

War Crimes for Rwanda and Tanzania.

29. Blakesley, *Report on the Obstacles to the Creation of a Permanent War Crimes Tribunal*, in *THE INTERNATIONAL LEGAL SYSTEM* 908, 901-11 (4th ed. 1995).

30. INTERNATIONAL COMMISSION OF JURISTS, *INTERNATIONAL CRIMINAL LAW* 1 (1995).

31. *Id.*

32. *Id.*

33. *Id.*

34. 1995 Draft Statute for an International Criminal Court, art. 6, § 3. See *infra* Appendix A (copy of original on file with author and the *Santa Clara Law Review*).

35. *Id.* § 1(a).

36. *Id.* § 1(b).

37. *Id.*

38. *Id.* arts. 41, 42, 43.

39. *Id.* art. 40.

iar to legal scholars from the common law tradition. The draft code and the most current observations are published following this brief historical introduction.⁴⁰ The code includes fifty articles establishing the court's legal foundation, organization, subject matter jurisdiction, prosecution and investigation procedures, trial practice, appellate procedures and enforcement authority.

As this is the first general publication of the draft code for American legal audiences, particular note should be taken of the observations and comments (included in the text) by the drafting committee. Within the year, it should be expected that cases will be brought before the court on both human rights and war crimes violations, and that U.S. lawyers will be practicing under this code in Paris. But the predominant scheme is statutory, with specific provisions provided for structural organization and operating procedures, much as in the civil law traditions. The draft code should be read prescriptively, as undoubtedly changes will occur over time as it is put into practice. A final revision working session will be held from June 19 to July 18, 1998 but few changes are expected at that juncture. Any final revisions will be provided to the General Assembly in August, and after what is expected by experts to be a precursory review, the code is to be voted into effect.

40. See *infra* Appendix A.

APPENDIX A

Max Planck Institute for Foreign and International Criminal
Law (MPI)

**Draft
Statute for an
International Criminal Court**

**Suggested Modifications to the 1994 ILC-Draft
(Siracusa-Draft)
prepared by a
Committee of Experts**

* * * * *

For Consideration by the United Nations General Assembly
Committee on the Establishment of a Permanent
International Criminal Court, Second Session, New York, 14-
25 August, 1995.

* * * * *

Siracusa/Freiburg/Chicago, 31 July 1995

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N.B.

- MODIFICATIONS ARE IN BOLD

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* *Editor's Note:* The text of this statute has been formatted to conform to the original Draft Statute for an International Criminal Court as closely as possible (copy of Original 1995 Draft Statute on file with author and the *Santa Clara Law Review*).

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I. INTRODUCTION

In June 1995, a Committee of Experts on an International Court met in Siracusa (Italy) under the auspices of the International Institute of Higher Studies in Criminal Sciences (ISISC), Siracusa (Italy), International Association of Penal Law and the Max Planck Institute for Foreign and International Criminal Law, Freiburg im Breisgau (Germany) to discuss and propose amendments to the very valuable and fruitful Draft Statute for a Permanent International Criminal Court as proposed by the International Law Commission (United Nations, Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994, General Assembly, Official Records, Forty-Ninth Session, Supplement No. 10, A/49/10, hereinafter: ILC-Draft-Statute). The Committee focused on questions and standards of International Criminal Law and Criminal Procedure.

Part II of this volume lists those articles of the ILC-Draft-Statute for which the Committee proposed changes. Reasons therefore are given only when these changes relate to substantive questions. Some changes are self-explanatory or reflect general practice.

The proposals are based on the assumption that the International Criminal Court will be established by an international treaty and not by a resolution of the Security Council. Further, the underlying idea is that - at least during its first years of activity - the Court will have to deal with relatively few cases brought under its basic jurisdiction, i.e.: genocide, aggression, war crimes, crimes against humanity (see Art. 20 [a] - [d]). A reassessment of this Statute might be advisable if the number of cases grows.

Part III contains further remarks and proposals concerning Art. 21, 27, 38 and 48.

As far as the *wording is* concerned, the Committee tried to stick to the ILC-Draft-Statute as much as possible. Proposed

changes are due to specific requirements of Criminal Law.¹

* * *

II. DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT SUGGESTED MODIFICATIONS TO THE ILC DRAFT STATUTE -

PART 1. ESTABLISHMENT OF THE COURT

Article I *The Court*

There is established an International Criminal Court („the Court”), whose jurisdiction and functioning shall be governed by the provisions of this Statute.

Article 2 *Relationship of the Court to The United Nations*

The President, with the approval of the States parties to this Statute („States parties”), may conclude an agreement establishing an appropriate relationship between the Court and the United Nations.

Article 3 *Seat of the Court*

1. The seat of the Court shall be established at ... in ... („the host State”).

2. The President, with the approval of the States parties, may conclude an agreement with the host State establishing the relationship between that State and the Court.

3. The Court may exercise its powers and functions on the territory of any State party and, by special agreement, on the

1. The committee considered it useful to replace the term “transfer” of a suspect with the term “surrender”. With a view to the relations between a state and the Court, the term “transfer” might also be misleading, as it is used for cooperation between two states, e.g.: n *Convention on the Transfer of Sentenced Persons* “, European Treaties Series, No. 112, 21 March, 1983.

territory of any other State.

Article 4
Status and legal capacity

1. The Court is a permanent institution open to State parties in accordance with this Statute. It shall act when required to consider a case submitted to it.

2. The Court shall enjoy in the territory of each State party such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

PART 2. COMPOSITION AND ORGANIZATION OF THE COURT

Article 5
Organs of the Court

The Court consists of the following organs:

- (a) a Presidency, as provided in article 8;*
- (b) an Appeals Chamber, Trial Chambers and other chambers, as provided in article 3;*
- (c) a Procuracy, as provided in article 12, and*
- (d) a Registry, as provided in article 13.*

Article 6
Qualification and election of judges

1. The judges of the Court shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices, and have, in addition:

- (a) criminal trial experience;*
- (b) recognized competence in international law*

2. Each State party may nominate for election not more than two persons, of different nationality, who possess the qualification referred to in paragraph 1 (a) or that referred to in paragraph 1 (b), and who are willing to serve as may be

required on the Court.

3. *Eighteen judges shall be elected by an absolute majority vote of the States parties by secret ballot. Ten judges shall first be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (a). Eight judges shall then be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (b).*

4. *No two judges may be nationals of the same State.*

5. *States parties should bear in mind in the election of the judges that the representation of the principal legal systems of the world should be assured.*

6. *Judges hold office for a term of nine years and, subject to paragraph 7 and article 7 (2), are not eligible for re-election. A judge shall, however, continue in office in order to complete any case the hearing of which has commenced.*

7. *At the first election, six judges chosen by lot shall serve for a term of three years and are eligible for re-election; six judges chosen by lot shall serve for a term of six years; and the remainder shall serve for a term of nine years.*

8. *Judges nominated as having the qualification referred to in paragraph I (a) or I (b), as the case may be, shall be replaced by persons nominated as having the same qualification.*

Article 7

Judicial vacancies

1. *In the event of a vacancy, a replacement judge shall be elected in accordance with article 6.*

2. *A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term, and if that period is less than five years is eligible for re-election for a further term.*

Article 8
The Presidency

1. The President, the first and second Vice-President and two alternate Vice-Presidents shall be elected by an absolute majority of the judges. They shall serve for a term of three years or until the end of their term of office as judges, whichever is earlier.

2. The first or second Vice-President, as the case may be, may act in place of the President in the event that the President is unavailable or disqualified. An alternate Vice-President may act in place of either Vice-President as required.

3. The President and the Vice-Presidents shall constitute the Presidency which shall be responsible for:

- (a) the due administration of the Court; and*
- (b) the other functions conferred on it by this Statute.*

4. Unless otherwise indicated, pre-trial and other procedural functions conferred under this Statute on the Court may be exercised by the Presidency in any case where a chamber of the Court is not seized of the matter.

5. The Presidency may, in accordance with the Rules, delegate to one or more judges the exercise of a power vested in it under articles 26 (3), 27 (5), 28, 29 or 30 (3) in relation to a case, during the period before a Trial Chamber is established for that case.

Article 9
Chambers

1. As soon as possible after each election of judges to the Court, the Presidency shall in accordance with the Rules constitute an Appeals Chamber consisting of the President and six other judges, of whom at least three shall be judges elected from among the persons nominated as having the qualification referred to in article 6 (1)(b). The President

shall preside over the Appeals Chamber.

2. The Appeals Chamber shall be constituted for a term of three years. Members of the Appeals Chamber shall, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.

3. Judges may be renewed as members of the Appeals Chambers for a second or subsequent term.

4. Judges not members of the Appeals Chamber shall be available to serve on Trial Chambers and other chambers required by this Statute, and to act as substitute members of the Appeals Chamber in the event that a member of that Chamber is unavailable or disqualified.

5. The Presidency shall nominate in accordance with the Rules five such judges to be members of the Trial Chamber for a given case. A Trial Chamber shall include at least three judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (a).

6. The Rules may provide for alternate judges to be nominated to attend a trial and to act as members of the Trial Chamber in the event that a judge dies or becomes unavailable during the course of the trial.

7. No judge who is a national of a complainant State or of a State of which the accused is a national shall be a member of a chamber dealing with the case.

Article 10

Independence of the judges

1. In performing their functions, the judges shall be independent.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In particular, they shall not while holding the office of judge be a member of the legislative or executive branches of the Government of a State, or of a body

responsible for the investigation or prosecution of crimes.

3. *Any question as to the application of paragraph 2 shall be decided by the Presidency.*

4. *On the recommendation of the Presidency, the States parties may by a two-thirds majority decide that the work-load of the Court requires that the judges should serve on a full-time basis. In that case:*

- (a) existing judges who elect to serve on a full-time basis shall not hold any other office or employment; and*
- (b) judges subsequently elected shall not hold any other office or employment.*

Article 11

Excusing and disqualification of judges

1. *The Presidency at the request of a judge may excuse that judge from the exercise of a function under this Statute.*

2. *Judges shall not participate in any case in which they have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest.*

3. *The Prosecutor or the accused may request the disqualification of a judge under paragraph 2.*

4. *Any question as to the disqualification of a judge shall be decided by an absolute majority of the members of the Chamber concerned. The challenged judge shall not take part in the decision.*

Article 12

The Procuracy

1. *The Procuracy is an independent organ of the Court responsible for the investigation of complaints brought in accordance with this Statute and for the conduct of prosecutions. A member of the Procuracy shall not seek or act*

on instructions from any external source.

2. The Procuracy shall be headed by the Prosecutor, assisted by one or more Deputy Prosecutors, who may act in place of the Prosecutor in the event that the Prosecutor is unavailable. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. The Prosecutor may appoint such other qualified staff as may be required.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character and have high competence and experience in the prosecution of criminal cases. They shall be elected by secret ballot by an absolute majority of the States parties, from among candidates nominated by State parties. Unless a shorter term is otherwise decided on at the time of their election, they shall hold office for a term of five years and are eligible for re-election.

4. The States parties may elect the Prosecutor and Deputy Prosecutors on the basis that they are willing to serve as required.

5. The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint involving a person of their own nationality.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a particular case, and shall decide any question raised in a particular case as to the disqualification of the Prosecutor or a Deputy Prosecutor.

7. The staff of the Procuracy shall be subject to Staff Regulations drawn up by the Prosecutor.

Article 13 The Registry

1. On the proposal of the Presidency, the judges by an absolute majority by secret ballot shall elect a Registrar, who shall be the principal administrative officer of the Court. They may in the same manner elect a Deputy Registrar.

2. *The Registrar shall hold office for a term of five years, is eligible for re-election and shall be available on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided on, and may be elected on the basis that the Deputy Registrar is willing to serve as required.*

3. *The Presidency may appoint or authorize the Registrar to appoint such other staff of the Registry as may be necessary.*

4. *The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar.*

Article 14
Solemn undertaking

Before first exercising their functions under this Statute, judges and other officers of the Court shall make a public and solemn undertaking to do so impartially and conscientiously.

Article 15
Loss of office

1. *A judge, the Prosecutor or other officer of the Court who is found to have committed misconduct or a serious breach of this Statute, or to be unable to exercise the functions required by this Statute because of long-term illness or disability, shall cease to hold office.*

2. *A decision as to the loss of office under paragraph 1 shall be made by secret ballot:*

- (a) in the case of the Prosecutor or a Deputy Prosecutor, by an absolute majority of the States parties;*
- (b) in any other case, by a two-thirds majority of the judges.*

3. *The judge, the Prosecutor or any other officer whose conduct or fitness for office is impugned shall have full opportunity to present evidence and to make submissions but shall not otherwise participate in the discussion of the question.*

Article 16
Privileges and immunities

1. *The judges, the Prosecutor, the Deputy Prosecutors and the staff of the Procuracy, the Registrar and the Deputy Registrar shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961.*
2. *The staff of the Registry shall enjoy the privileges, immunities and facilities necessary to the performance of their functions.*
3. *Counsel, experts and witnesses before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.*
4. *The judges may by an absolute majority decide to revoke a privilege or waive an immunity conferred by this article, other than an immunity of a judge, the Prosecutor or Registrar as such. In the case of other officers and staff of the Procuracy or Registry, they may do so only on the recommendation of the Prosecutor or Registrar, as the case may be.*

Article 17
Allowances and expenses

1. *The President shall receive an annual allowance.*
2. *The Vice-Presidents shall receive a special allowance for each day they exercise the functions of the President.*
3. *Subject to paragraph 4, the judges shall receive a daily allowance during the period in which they exercise their functions. They may continue to receive a salary payable in respect of another position occupied by them consistently with article 10.*
4. *If it is decided under article 10 (4) that judges shall thereafter serve on a full-time basis, existing judges who elect to serve on a full-time basis, and all judges subsequently*

elected, shall be paid a salary.

Article 18
Working languages

The working languages of the Court shall be English and French.

Article 19
Rules of the Court

1. Subject to paragraphs 2 and 3, the judges may by an absolute majority make rules for the functioning of the Court in accordance with this Statute, including rules regulating:

- (a) the conduct of investigations;
- (b) the procedure to be followed and the rules of evidence to be applied;
- (c) any other matter which is necessary for the implementation of this Statute.

2. The initial Rules of the Court shall be drafted by the judges within six months of the first elections for the Court, and submitted to a conference of States Parties for approval. The judges may decide that a rule subsequently made under paragraph 1 should also be submitted to a conference of States Parties for approval.

3. In any case to which paragraph 2 does not apply, rules made under paragraph 1 shall be transmitted to States Parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States Parties have communicated in writing their objections. **In that case, the judges may change the drafted rule taking into account the objections of the States parties and The Presidency may either retransmit to them, or submit the draft to a conference of the States parties for their approval.**

4. A rule may provide for its provisional application in the period prior to its approval or confirmation. A rule not approved or confirmed shall lapse.

Reasons for the changes:

If a change of the rules in a "summary procedure" is rejected by the majority of the States parties (Art.19, pare 3), it may still be possible to have recourse to this procedure again, if the views of the objecting States have been taken into account, thus avoiding a cumbersome conference of States parties. Anyway a further procedure should be provided for.

...

PART 3. JURISDICTION AND SUBSTANTIVE CRIMES

Article 20

Crimes within the jurisdiction of the Court

The Court has jurisdiction in accordance with this Statute to try persons responsible for:

- (a) the crime of genocide, **when committed with an intent to destroy, in whole or in part, a national, ethnical, racial or religious group. This includes any of the following acts:**
 - (i) **killing members of the group;**
 - (ii) **causing serious bodily or mental harm to members the group;**
 - (iii) **deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;**
 - (iv) **imposing measures intended to prevent births within the group;**
 - (v) **forcibly transferring children of the group to another group.**
- (1) **The following acts shall be punishable:**
 - (i) **genocide;**
 - (ii) **conspiracy to commit genocide;**
 - (iii) **direct and public incitement to commit genocide;**
 - (iv) **attempt to commit genocide;**

- (v) **complicity in genocide.**
- (b) **the crime of aggression is committed when:**
 - (i) **a leader or organizer**
 - (ii) **plans, commits or orders an act**
 - (iii) **against a State**
 - (iv) **in contravention to the Charter of the United Nations**
 - (v) **which threatens that State's**
 - (1) **sovereignty;**
 - (2) **territorial integrity; or**
 - (3) **political independence**
 - (vi) **and who unjustifiably uses armed force to:**
 - (1) **invade the territory of a State;**
 - (2) **attack the civilian population of a State;**
 - (3) **militarily occupy the territory of a State following an invasion using armed forces;**
 - (4) **annex the territory of a State or part of a State;**
 - (5) **bombard or use other weapons of destruction against the territory of a State; or**
 - (6) **blockade the ports or coasts of a State;**
- (c) **war crimes: grave breaches and other serious violations of the law and customs applicable in armed conflict, which would include:**
 - (i) **willful killing;**
 - (ii) **torture or inhuman treatment, including biological experiments;**
 - (iii) **willfully causing great suffering or serious injury to body or health;**
 - (iv) **extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.**
 - (v) **compelling a prisoner of war or protected**

person to serve in the forces of a hostile Power;

- (vi) willfully depriving a prisoner of war or a protected person of the rights of a fair and regular trial;
- (vii) unlawful deportation or transfer or unlawful confinement of a protected person;
- (viii) taking of hostages;
- (ix) any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty;

(1) Even with a person's consent, the following acts are prohibited:

- (A) physical mutilations;
- (B) medical or scientific experiments;
- (C) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph (ix);

(2) Exceptions to the prohibition in paragraph (ix)(l)(C) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and recipient.

(3) Any willful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs (ix) and (ix)(l) or fails to meet the exceptions in (ix)(2)

(4) The persons protected under paragraph (ix) have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavor to obtain a written statement to that effect, signed or acknowledged by the patient.

(x) the following acts when committed willfully and causing death or serious injury to body or health:

- (1) making the civilian population or individual civilians the object of attack;**
- (2) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;**
- (3) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;**
- (4) making non-defended localities and demilitarized zones the object of attack;**
- (5) making a person the object of attack in the knowledge that he is hors de combat;**
- (6) the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other recognized protective signs under international law;**
- (7) the transfer by the occupying Power of parts of its own civilian populations into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;**
- (8) unjustifiable delay in the repatriation of prisoners of war or civilians;**
- (9) practices of apartheid and other inhuman and**

degrading practices involving outrages upon personal dignity, based on racial discrimination;

- (10) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result, extensive destruction thereof, where there is no evidence of the violation by the adverse Party of using such objects in support of a military effort, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;**

This section shall also apply to other serious violations of the law and customs of war applicable in armed conflict which are generally accepted as customary international law:

- A. As defined by conventions; or**
- B. As evidenced by the practice of States**

(d) for the following crimes against humanity when committed as part of a widespread or systematic attack against any civilian population on national, political, cultural, ethnic, racial or religious grounds:

- i. Extermination;**
- ii. Murder, including killings done by knowingly creating conditions likely to cause death;**
- iii. Enslavement, including slavery-related practices;**
- iv. Deportation;**
- v. Imprisonment, in violation of international norms on the prohibition of arbitrary arrest and detention;**

- vi. **Torture;**
- vii. **Rape and other serious assaults of a sexual nature;**
- viii. **Persecution including laws and practices targeting such groups or their members in ways that seriously and adversely affect their material well-being, their welfare or ability to maintain their group identity;**
- ix. **Other inhumane acts, including but not limited to serious attacks upon physical integrity, personal safety, and individual dignity, such as castration or other mutilation, forced impregnation or forced carrying to term of fetuses that are the product of forced impregnation, and unlawful human experimentation.**

(e) [additional crimes are listed in appendix]

Reasons for the changes:

1. The definition of genocide in art. 20(a) is taken directly from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Committee raised some questions that suggest a future refinement or clarification of the language “in whole or in part”. For example, the Committee questioned whether a deliberate effort by an adverse party to kill all members of a specified group who reside in a specific town would constitute genocide “in part” under the definition if other members of the same group were dispersed elsewhere throughout the State yet not targeted. Situations such as this have arisen in the former Yugoslavia, and the Committee believes that such acts should be regarded as genocide.
2. An attempt to define the crime of aggression in art. 20(b) raises serious political considerations for many Member States. It was clearly unavoidable that an inextricable link to the mechanism contained within Article 23 regarding the manner by which a complaint of aggression would be brought before the Court would strongly influence the debate.
3. On one hand, it could be argued that the crime of aggression should be eliminated from the statute,

particularly due to the serious political concerns that have arisen which might jeopardize or delay the creation of an International Criminal Court. After all, inclusion of the crime of aggression may be unnecessary since unlawful aggressive acts of Member States could still be punished by the Security Council. Furthermore, individuals who commit or order such acts to occur would likely have committed additional acts as a result that not only fell within the jurisdiction of the Court but were more easily definable and prosecutable. On the other hand, failure to include aggression could be seen as an overt regression from the advances of international law since the Nuremberg Charter. If the crime of aggression is to be included within the statute of the Court, the Committee firmly believed that it should not be limited to state officials, as private individuals and groups in today's society have clearly developed the ability, as well as possessing the means and opportunity, to undertake acts that would otherwise constitute aggression were they to have been committed by a State.

4. The crime of aggression has primarily developed over the last fifty years by its reference in Section 6 (a) of the Charter of the International Military Tribunal, and by the attempts at a definition contained in the 1974 General Assembly Resolution 3314 and the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind. Two other definitions that were considered for aggression, but had not yet been amended to apply to individual perpetrators, were as follows:

Section 1. Definition

1.0 Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.

Section 2. Prima Facie Evidence

2.0 The first use of armed force by a state in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act

of aggression has been committed would not be justified in light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

Section 3. Acts of Aggression

3.1 Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:

- (a) the invasion or attack by the armed forces of a state or the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another state or part thereof;
- (b) bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state against the territory of another state;
- (c) the blockade of the ports or coasts of a state by the armed forces of another state;
- (d) an attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state;
- (e) the use of armed forces of one state which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;
- (f) the action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state;
- (g) the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such

gravity as to amount to the acts listed above, or its substantial involvement therein.

3.2 The list of acts enumerated above is not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Section 4. Lack of Justification

4.0 No consideration of whatever nature, whether political economic, military or otherwise, may serve as a justification for aggression.

Section 5. Consequences of Aggression

5.1 A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

5.2 No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Section 6. Scope of Prohibition

6.1 Nothing in this definition, and in particular Article 3, could in any way prejudice the rights to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of those rights and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. In particular, this applies to peoples under colonial and racist regimes or other forms of alien domination. Nor does Article 3 prejudice the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned declaration.

Section 7. Interpretation

7.0 In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

B) The crime of aggression means the military power of a state against the sovereignty, territorial integrity or political independence of another state which is in

contradiction to the Charter of the United Nations, and would include the following acts:

- (1) a declaration of war against another state;
- (2) the invasion by armed forces of the territory of another state without declaration of war;
- (3) the bombarding the territory of another state by its land, naval or air forces of another state;
- (4) the landing in, or introduction within the frontiers of another state, of land, naval, or air forces without the permission of the government of such state, or the infringement of the condition of such permission, particularly as regards the sojourn or extension of area;
- (5) the establishment of a naval blockade of the coasts or ports of another state.

5. The amendment of Article 20 (c) to include, under the heading of serious violations of the laws and customs of war, the "grave breaches" listed in the Geneva Conventions and Protocol I serves to clarify that these "grave breaches" are serious violations of the laws and customs applicable in armed conflict. Art. 20 (c) is divided into two sections. The first section includes a listing of specific offenses so as to comport with the sections of this article. The second section incorporates those Conventions that have codified customary international law, and, in addition, rules of customary international law that are reflected by state practice but may not be codified by any conventions.

6. An analysis of the crimes contained in the first part of art. 20 (c) is as follows: The crimes contained in art. 20 (c) (i)-(viii) are derived from, and are to be defined in accordance with, Article 50 of the Geneva Convention for the Amelioration of the Conditions of Wounded and Sick in Armed Forces in the field of 12 August 1949, Article 51 of the Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at sea of 12 August 1949, Article 130 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 and Article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

Section (ix) of art. 20 (c) lists those grave breaches as contained in Article 11 of Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts. It is intended to cover the physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 of the Protocol which includes armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Section (x) of art. 20 (c) lists those grave breaches as contained in Article 11 of Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts. The acts described in this section are considered grave breaches of the Conventions and this Protocol if committed against persons in the power of an adverse party protected by articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse party and are protected by this Protocol. Paragraphs (x)(2) and (3) regarding certain types of attacks are to be read in accordance with the definitions contained in article 57, paragraph (2)(a)(iii) of the Protocol. Section (x)(6) relating to "perfidy" is to be read in connection with article 37 of the Protocol, while section (x)(10) should be interpreted in conjunction with article 54, subparagraph (b).

7. It was thought helpful to divide the second section of art. 20 (c) into two parts: the first, "A", relates to customary international law developed over long periods of time that has been codified into conventions. Thus, the conventions represent customary international law and are binding on all persons. An annex has been prepared in which the

conventions relating to aimed conflict are set out. Those not reflecting customary international law are so indicated. Conventions which do not reflect the practices of States are binding only among those parties who have ratified or otherwise acceded to them as a matter of domestic law. Therefore, the Court would only possess criminal jurisdiction over violations of these conventions with respect to those State parties.

8. The second part, "B", looks outside of the conventions to customary international law established by the practices of States. Such practices may, for example, be found in the military manuals of a State duly authorized by an appropriate body, but only if such prohibition reflects the practices of States. While Part "B" may be infrequently utilized because of the breadth of Part "A", and because of the difficulties of overcoming the *nullum crimen sine lege* prohibition, it is nonetheless included here to encompass those situations in which the prohibition is clearly stated under domestic law or military law and in which the prohibition reflects the practices of States but in which there is no appropriate convention.

9. Common Article 3 of the Geneva Conventions, as supplemented by Protocol II, should be considered for inclusion as a third section of this article in order to ensure that serious crimes which occur in the context of armed conflict not of an international character are made punishable. As has been seen by early prosecutions under the Statute of the International Criminal Tribunal for the former Yugoslavia, a defendant charged with grave breaches of the Geneva Conventions will argue that the character of the armed conflict was not international in scope and therefore the grave breaches do not apply. If this argument is accepted, then some serious crimes may go unpunished because of an unnecessary gap in the statute to support prosecution.

10. Some persuasive arguments can be made as to why Common Article 3 should be included: First, the crimes listed under Common Article 3 are similar to the crimes listed as "grave breaches", and there is nothing in their

character which would disqualify them. This is evidenced by the inclusion of violations of Common Article 3, as supplemented by Protocol II as crimes under Article 4 of the Statute of the International Criminal Tribunal, for Rwanda. The internal character of that armed conflict made reference to the "Grave Breaches" of the Geneva Conventions inappropriate; yet, it was clearly recognized that similar violations of Common Article 3 could be substituted in an armed conflict not of an international character.

11. Further, although individual responsibility is not specifically referred to in Common Article 3, the underlying acts are clearly condemned when committed by governments. The long history of such condemnation could be suggestive that those who perform such acts are to be held individually liable. Lastly, the specific mention in Article 1 of Protocol 2 that the protocol "develops and supplements Article 3" insofar as it is made applicable to armed conflicts not covered by Protocol 1, makes it an especially valuable tool for the development of individual criminal liability. It is for these reasons that the Committee suggests consideration of the inclusion of Common Article 3 for violations of the laws and customs of war when there is an internal armed conflict. Common Article 3 applies to armed conflicts of an internal character and states:

...the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

12. The changes to article 20 (d) are based on Article 3 of the Statute of the International Criminal Tribunal for Rwanda. The term "crimes against humanity" was used to describe

one of the three categories of “Nuremberg crimes.” This category originally included the crime of Genocide, which is being treated as a separate category under contemporary proposals for jurisdictional bases for an international criminal court, including the pending International Criminal Law Commission proposal for a permanent court and the statutes for *ad hoc* tribunals to deal with crimes in former Yugoslavia and in Rwanda, as well as in the 1993 proposal of the International Association of Penal Law.

13. However, Crimes of Genocide are defined by convention in narrower terms than the Crimes Against Humanity listed in Article 3—the acts proscribed in the Genocide Convention are framed in terms of the intent to destroy the groups rather than to merely reduce their size or make their members suffer, and political and cultural groups are not addressed. Accordingly, the present article is designed to address genocide-like crimes against additional groups—political and cultural—and acts for which genocidal intent may be lacking, but which are shockingly harmful to protected groups.

The addition of cultural groups is intended to deal with situations like the Khmer Rouge slaughter of educated Cambodians and to protect linguistic minorities and other groups that are distinctive in other respects.

14. When arising in connection with armed conflict, these acts are clearly forbidden under Common Article 3 or the Geneva Conventions of 1949 or under Protocol II additional to those conventions. In the absence of an armed conflict, these acts are all forbidden under general international conventions. Article 3 of the Rwanda statute merely codifies this legal fact.

15. The present article merely elaborates on the premises of the Rwanda article. For most categories of crimes that are simply named under the Rwanda article the present article provides a more precise definition and includes an exhaustive listing of examples for all but the last category in order to assure compliance with the principle of legality. Only for the last category is the list facially non-exhaustive. This means that the Court can reach listed examples without any reproach, and that it may reach further instances of similar

and equally reprehensible conduct if it so chooses.

16. A section-by-section explanation follows:

- (a) Extermination is forbidden as to the two additional groups, and this prohibits genocide-like acts against such groups without requiring the same level of specific intent.
- (b) Murder is supplemented by a generic description of additional serious homicides.
- (c) Enslavement is elaborated to include the full-range of slave-related practices that have been addressed by general international conventions, including white slavery, forced labor, debt bondage and other related practices.
- (d) Deportation is intended to relate to forced removal of civilian populations on the above-mentioned grounds without justification under national and international law. This provision is not intended to criminalize violations of existing conventions relating to the status of refugees.
- (e) This provision incorporates the Draft Principles on Freedom from Arbitrary Arrest and Detention.
- (f) Acts of torture are those defined in Article 1 of the Torture Convention, with its exclusions, but the acts are intended to be proscribed regardless of the underlying purpose.
- (g) This language is intended to include sodomy and sexual acts with persons who lack the legal capacity to consent.
- (h) The added language is intended to increase clarity.
- (i) The added language gives specific examples that can be the basis of interpretation, and the listing is expressly non-exhaustive to permit a Court, if it so chooses, to try additional crimes.

17. Art. 20 (e) should be incorporated within the Statute, but the specific crimes that should be included under it are not designed. It is clear, however, that the situation between the governments of the United States, United Kingdom and Libya, that has been created as a result of the bombing of Pan American Flight 103, is a matter that should be within the jurisdiction of the Court. Following a determination of

which crimes should fall within the framework of art. 20 (e), the Committee suggests the following two provisions be considered for inclusion in order to ensure primary jurisdiction vests with the Court in specific instances:

The Court shall have primary jurisdiction over those crimes referred to in article 20 (e) only when:

- (a) the Court is satisfied, upon the showing of the Prosecutor, that prima facie evidence exists that the State seeking to exercise national jurisdiction may share complicity in the underlying act, or the proceedings may otherwise be unfair or ineffective; or
- (b) the State which has custody of the suspect(s) and the State(s) seeking the extradition or surrender of the suspect(s) have agreed to transfer jurisdiction to the Court.

ANNEX TO ARTICLE 20 (3)

The following Conventions are regarded as having arisen to the level of customary international law:

WAR CRIMES

- 1) Convention for Amelioration of the Condition of the Wounded in Armies in the Field (First Red Cross Convention), 22 August 1864
- 2) Additional Articles Relation to the Condition of the Wounded in War, 20 October 1868.
- 3) Project of an International Declaration Concerning the Laws and Customs of War (Declaration of Brussels) [Brussels Conference on the Laws and Customs of War, No. 18], 27 August 1874.
 - (a) Final Protocol [Brussels Conference on the Laws and Customs of War, No. 19].
- 4) Convention with Respect to the Laws and Customs of War on Land (First Hague, II), 29 July 1899.
 - (a) Regulations Respecting the Laws and Customs of War on Land.
- 5) Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864

(First Hague, III), 29 July 1899.

- 6) Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Second Red Cross Convention), 6 July 1906.
- 7) Convention Respecting the Laws and Customs of War on *Land* (Second Hague, IV), 18 October 1907.
 - (a) Regulations Respecting the Laws and Customs of War on Land.
- 8) Convention Concerning Bombardment by Naval Forces in Time of War (Second Hague, IX), 18 October 1907.
- 9) Convention for the Adaptation to Maritime Warfare Principles of the Geneva Convention (Second Hague, X), 18 October 1907.
- 10) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Red Cross Convention), 27 July 1929.
- 11) Geneva Convention Relative to the Treatment of Prisoners of War, 27 July 1929.
- 12) Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, 6 November 1936.
- 13) Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Charter), 8 August 1945.
 - (a) Charter of the International Military Tribunal.
- 14) Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 12 August 1949.
- 15) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949.
- 16) Geneva Convention Relative to the Treatment of

Prisoners of War, 12 August 1949.

- 17) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
- 18) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968.
- 19) European Convention on the non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes (Inter-European), 25 January 1974.

UNLAWFUL USE OF WEAPONS

- 20) Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg Declaration), 1 December 1868.
- 21) Declaration Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases (First Hague, IV 2), 29 July 1899.
- 22) Declaration Concerning the Prohibition of the Use of Expanding Bullets (First Hague, IV, 3), 29 July 1899.
- 23) Convention Relative to the Laying of Automatic Submarine Contact Mines (Second Hague, VIII), 18 October 1907.
- 24) Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, 6 February 1922.
- 25) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925.
- 26) Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972.

GENOCIDE

- 27) Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

The following Conventions are not yet considered to have risen to the level of customary international law:

WAR CRIMES

- 28) Protocol I Additional to the Geneva Conventions of 12 August 1949, 12 December 1977.
- 29) Protocol II Additional to the Geneva Conventions of 12 August 1949, 12 December 1977.

UNLAWFUL USE OF WEAPONS

- 30) Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 10 April 1981.
- (a) Protocol Concerning Non Detectable Fragments to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Protocol D);
 - (b) Protocol Concerning the Use of Mines, Booby Traps and Other Devices to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Protocol II);
 - (c) Protocol Concerning the Use of Incendiary Weapons to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Protocol III).
- 31) Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 18 May 1977.
- 32) Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 13 Jan. 1993.

*Article 21**Preconditions to the exercise of jurisdiction*

1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if:

- (a) in a case of genocide, a complaint is brought under article 25 (1);*
- (b) in any other case, a complaint is brought under article 25 (2) and the jurisdiction of the Court with respect to the crime is accepted under article 22:*
 - (i) by the State which has custody of the suspect with respect to the crime ("the custodial State"); and*
 - (ii) by the State on the territory of which the act or omission in question occurred.*

2. If, with respect to a crime to which paragraph 1 (b) applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance the requesting State of the Court's jurisdiction with respect to the crime is also required.

Alternate Article 21**Preconditions to the exercise of jurisdiction**

1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in Article 20 if the matter is referred to the Court by the Security Council acting under Chapter VII of the U.N. Charter or if a complaint is lodged by either a State party or by the Prosecutor:

- (a) in cases of genocide;**
- (b) in cases of crimes against humanity;**
- (c) in cases of aggression, provided the Security Council has first determined that the conduct of the State complained of may be prosecuted as aggression;**
- (d) in cases of war crimes, except when:**
 - (i) a status of forces agreement confers juris-**

diction upon the State of nationality of the accused; or

(ii) the acts which are the subject of the complaint occurred as part of a United Nations- or regional organization-mandated force.

(e) in cases governed by Article 20 (e), subject to the conditions in Article 22, and provided that the complainant State is either the State having custody of the suspect or is the State within whose territory the alleged crime occurred, irrespective of any extradition treaties between such complainant State and any other State.

2. In case of Article 21 paragraph 1, (d) the Court shall defer proceedings to the State of nationality of the accused, provided such national jurisdiction is fair and effective and proceedings are initiated within a reasonable time from the date of the filing of a complaint under this paragraph;

3. When a complaint with respect to a crime under paragraph 1 (d) is brought before the Court, the prosecutor may seek to establish before a Chamber of the Court that the national jurisdiction is neither fair nor effective. The State Party in question shall have the opportunity to respond and present evidence. The prosecutor or Court may request that State to submit satisfactory proof of the initiation of proceedings within a reasonable period of time.

There was no time to discuss in detail, and to agree upon, the issue of the initiation of proceedings, dealt with in ILC Articles 21, 22, 23, and 25. A proposal to that effect is included in Part III; it would modify considerably present Article 21, restrict to Article 20 (e) crimes the options for acceptance of jurisdiction under Article 22, incorporate present Article 23 and present Article 25, paragraphs 1, 2, and 4, into new Article 21.

The main argument for the proposed changes is that any State Party should, as a general rule, be entitled to initiate proceedings leading eventually to prosecutions before the

Court of all of the serious crimes listed in Article 20, paragraphs (a) through (d). This appears to be wholly justified by the *jus cogens* element inherent in all of these offences. Restrictions regarding the complainant States are thus only required as regards offences (Articles 20 [e]) for which the Court's jurisdiction is optional under Article 22.

Article 22

Acceptance of the jurisdiction of the Court for the purposes of article 22

1. *A State party to this Statute may:*

- (a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or*
- (b) at a later time, by declaration lodged with the Registrar;*

accept the jurisdiction of the Court with respect to such of the crimes referred to in article 20 as it specifies in the declaration.

2. *A declaration may be of general application, or may be limited to particular conduct or to conduct committed during a particular period of time.*

3. *A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving six months' notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.*

4. *If under article 21 the acceptance of a State which is not a party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the Court exercising jurisdiction with respect to the crime.*

Article 23

Action by the Security Council

1. *Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the*

Court by the Security Council acting under Chapter VII of the Charter of the United Nations.

2. A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.

Article 24

Duty of the Court as to jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it.

...

PART 4. INVESTIGATION AND PROSECUTION*Article 25
Complaints*

- 1. A State party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed.*
- 2. A State party which accepts the jurisdiction of the Court under article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.*
- 3. As far as possible a complaint shall specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.*
- 4. In a case to which article 23 (1) applies, a complaint is not required for the initiation of an investigation.*

**Article 26
Investigation of alleged crimes**

1. On receiving a complaint or upon notification of a decision of the Security Council referred to in article 23 (1), the Prosecutor shall initiate an investigation unless the Prosecutor concludes that there is no possible basis for a prosecution under this statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the Presidency.
2. The Prosecutor may:
 - (a) request the presence of and question suspects and witnesses;
 - (b) collect documentary and other evidence;
 - (c) conduct on-site investigations;
 - (d) Take necessary measures to ensure the confidentiality

of information or the protection of any person;

- (e) as appropriate seek the cooperation of any State, **governmental or non governmental organizations**, or of the United Nations.

3. The Presidency may, at the request of the Prosecutor, issue such subpoenas and warrants as may be required for the purposes of an investigation including a warrant under article 28 (1) for the provisional arrest of a suspect.

4. If, upon investigation and having regard, *inter alia*, to the matters referred to in article 35, the Prosecutor concludes that there is no sufficient basis for a prosecution under the Statute and decides not to file an indictment, the Prosecutor shall so inform the Presidency, and the complainant State giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.

5. At the request of a complainant State or, in a case to which article 23 (1) applies, at the request of the Security Council, the Presidency shall review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, **and may instruct the Prosecutor to initiate an investigation or to file an indictment. The order shall be communicated to the complainant State or the Security Council.**

6. A person suspected of a crime under this Statute shall:

- (a) prior to being questioned, be informed that the person is a suspect and of the rights:
 - (i) to remain silent, without such silence being a consideration in the determination of guilt or innocence; and
 - (ii) to have the assistance of counsel of the suspect's choice or, if the suspect lacks the means to retain counsel, to have legal assistance assigned by the Court. **If the suspect does not apply for the assignment of counsel, the Court may assign counsel if the interests of justice so require;**
- (b) not to be compelled to testify or to confess guilt; and
- (c) if questioned in a language other than a language the

suspect understands and speaks, **or if he is unable to communicate with counsel in a language he understands and speaks**, be provided with competent interpretation services and with translation of any document on which the suspect is to be questioned.

- (d) **to apply, on an issue-specific basis, for any of the powers of the prosecutor under art 26 (2) (a), (b), (c) and (e) to be exercised in his interest, with the right to apply for an order of the Presidency in case of a refusal by the Prosecutor.**
- (e) **to obtain after his questioning a copy of the record of the interrogation or, if tape- or video-recorded, a copy thereof and if he has no facilities to play the tapes, in addition, a transcript of the interrogation.**

Reasons for the changes:

Art. 26 (para 2 e):

Co-operation of governmental and non-governmental organizations may be of great use and should, therefore, not be excluded.

Art. 26 (para 4):

A complainant State shall be informed about the outcome of its complaint.

Art. 26 (para 5):

The Presidency should be able to order an investigation or to file an indictment if it considers the decision of the Prosecutor manifestly ill-founded. The proposed changes do not infringe upon the independence of the Prosecutor. They enhance his independence by making political pressures not to investigate a crime or not to file an indictment ineffective.

Art. 26 (para 6 a ii):

It is in the interest of justice that counsel be assigned without a request of the suspect if the latter is incapable of taking sufficient care of his own interests. It is taken for granted that the right to have the assistance of counsel includes the right to be assisted by him during

interrogations.

Art. 26 (para 6c)

It is to be expected that the suspect or accused will not always be able to communicate in his own language with the counsel assigned to him. He therefore has to rely on the services of an interpreter in order to prepare his defence. The availability of an interpreter is part of the adequate facilities for the defence as required by art. 41 para. 1 (b)

Art. 26 (para 6 d)

The right to request application of the Prosecutor's powers is an important feature of the "equality of arms" during pre-trial proceedings. Without this facility it may be impossible to obtain information that is relevant to the defence, notably documents.

Art. 26 (para 6 e)

(e) The right to obtain copies or transcripts is especially, but not only, important in cases in which counsel has not been present during interrogations.

Article 27 Commencement of prosecution

1. If upon the investigation the Prosecutor concludes that there is a prima facie case, **which means a credible case which would - if not contradicted by the defence - be a sufficient basis to convict the accused**, the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.

2. The Presidency shall **provide the Prosecutor, the suspect -if not in detention abroad-and/or his counsel an opportunity to be heard; thereafter the Presidency shall examine the indictment and all supporting material available at that time and determine:**

- (a) whether a prima facie case exists with respect to a crime within the jurisdiction of the Court; and
- (b) whether, having regard, *inter alia*. to the matters referred to in article 35, the case should, on the **mate-**

rial available, be heard by the Court.

If so, the Presidency shall confirm the indictment and establish a trial chamber in accordance with article 9.

3. If, after any adjournment that may be necessary to allow additional material to be produced **by the Prosecutor or the suspect**, the Presidency decides not to confirm the indictment, it shall so inform the complainant State or, in a case to which article 23 (1) applies, the Security Council.

4. The Presidency may at the request of the Prosecutor amend the indictment, in which case it shall make any necessary orders to ensure that (1) the accused is notified of the amendment and has adequate time to prepare a defence, **and (2) the State which has surrendered the accused and the States which have consented to the Court's jurisdiction over the case do not object to the amendment in accordance with articles 55 and 21.**

5. The Presidency may make any further orders required for the conduct of the trial, including an order:

- (a) determining the language or languages to be used during the trial;
- (b) requiring the disclosure to the defence, within a sufficient time before the trial to enable the preparation of the defence, of documentary or other evidence available to the Prosecutor, whether or not the Prosecutor intends to rely on that evidence;
- (c) providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;
- (d) providing for the protection of the accused, victims and witnesses and of confidential information.

Observation on Article 27 para. 1

The word "shall" implies, as a general principle, that the Prosecutor is obliged to file an indictment in all cases under investigation, provided a *prima facie* case exists. However, special circumstances may make it very difficult to comply with this duty, notably where the Prosecutor is confronted

with a huge number of cases, making a selection almost unavoidable. However, giving discretionary power to the Prosecutor might bring him in conflict with either the Security Council or the State that requested the investigation.

Reasons for the changes:

Art.27, para. 1

In order to avoid any dispute about the meaning of the (common law) concept of a prima facie case, the explanation given in the commentary on the ILC-Draft has been integrated in err 27 (1) of the this Draft Statute itself.

Art. 27, para 2

As far as the introduction of an oral hearing -prior to the confirmation of the indictment- is concerned, it should be clear that this should not be a mini trial in itself. The hearing aims at preventing someone from being tried in public when there are no sound reasons to justify this. If it is highly unlikely that the trial chamber would convict the accused, it would be unfair to expose the suspect to a public trial. However, in order to reach a balanced decision, the suspect should have an opportunity to state his views on the merits of the indictment and the material available. If the suspect is in detention in another country (awaiting the confirmation of the indictment prior to being transferred to the host state of the tribunal) counsel should be given the opportunity to represent him. If the suspect is available, he may be assisted by his counsel.

Art. 27 para.3

Mere clarification of the text.

Art.27, para.4

This is an application by analogy to a case of surrender of the rule of speciality prevailing in extradition cases. The same solution has been adopted in Art. 59, pare. 7 (infra).

Article 28

Arrest

1. *At any time after an investigation has been initiated, the*

Presidency may at the request of the Prosecutor issue a warrant for the provisional arrest of a suspect if:

- (a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court; and*
- (b) the suspect may not be available to stand trial unless provisionally arrested.*

2. A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 90 days of the arrest, or such longer time as the Presidency may allow

3. As soon as practicable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a warrant for the arrest and transfer of the accused. The Presidency shall issue such a warrant unless it is satisfied that:

- (a) the accused will voluntarily appear for trial; or*
- (b) there are special circumstances making it unnecessary for the time being to issue the warrant.*

4. A person arrested shall be informed at the time of arrest of the reasons for the arrest and shall be promptly informed of any charges.

Art. 29

Pre-trial detention or release

1. A person arrested shall be brought promptly before a judicial officer of the State where the arrest occurred. The judicial officer shall determine, in accordance with the procedures applicable in that State, that the warrant has been duly served and that the rights of the accused **listed in this Statute, especially the minimum guarantees listed in Article 26**, have been respected.

2. A person arrested may apply to the Presidency for release pending trial. The Presidency may release the person unconditionally or on bail if it is satisfied that the accused will appear at the trial, **and -if released- will not pose a danger to victims, witnesses or any other person.**

3. A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it may order the release of the accused, and may award compensation.

4. A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or if necessary, in the host State.

Reasons for the changes:

Art. 29 para. 1:

A reference to article 26 will clarify what rights of the accused shall be guaranteed as a minimum.

Art. 29 para. 2:

The proposed changes are inspired by Rule 65 of the Rules of Procedure and Evidence of the Yugoslavia Tribunal. The Presidency's power to release the arrested person on bail on condition that he will appear at the trial should be subject to the additional condition that the arrested person, if released, will not pose a danger to victims, witnesses or any other person.

Art. 29 para. 3:

The Presidency should be able to exercise a measure of discretion in deciding whether the person arrested will be released or not as a consequence of an unlawful arrest or detention. Not every violation of the relevant provisions should automatically entail the release of the person, but only the more serious ones.

Article 30
Notification of the indictment

1. The Prosecutor shall ensure that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, in a language understood by that person:

- (a) in the case of a suspect provisionally arrested, a statement of the grounds for the arrest;*
- (b) in any other case, the confirmed indictment;*
- (c) a statement of the accused's rights under this Statute.*

2. In any case to which paragraph (1) (a) applies, the indictment shall be served on the accused as soon as possible after it has been confirmed.

3. If, 60 days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under article 28 (3), or for some reason the requirements of paragraph 1 cannot be complied with, the Presidency may on the application of the Prosecutor prescribe some other manner of bringing the indictment to the attention of the accused.

Article 31
Persons made available to assist in a prosecution

1. The Prosecutor may request a State party to make persons available to assist in a prosecution in accordance with paragraph 2.

2. Such persons should be available for the duration of the prosecution, unless otherwise agreed. They shall serve at the direction of the Prosecutor, and shall not seek or receive instructions from any Government or source other than the Prosecutor in relation to their exercise of functions under this article.

3. The terms and conditions on which persons may be made available under this article shall be approved by the Presidency on the recommendation of the Prosecutor.

PART 5: THE TRIAL*Article 32
Place of trial*

Unless otherwise decided by the Presidency, the place of the trial will be the seat of the Court.

*Article 33
Applicable Law*

The Court shall apply:

- (a) this Statute;*
- (b) applicable treaties and the principles and rules of general international law; and*
- (c) to the extent applicable, any rule of national law.*

Commentary:

Article 33 of the ILC Draft statute should not be interpreted to permit the Court to substitute the laws of any nation or general international law for a proper "general part" of an applicable substantive criminal law. Accordingly, such a General Part must be elaborated, and to be suitable for international use, it should reflect principles from the major criminal law systems of the world in language that is as neutral or universal as possible. The following is an outline of the work that is envisioned.

It is based on an attempt to develop a common structure and nomenclature compatible with most of the European Codes and the U.S. Model Penal Code:

Open questions and elements to be regulated in a General Part

I. Sources of Law

- A. *Nullum crimen sine lege (especially: certainty, no retroactivity)*
- B. *Roles of international / national law*

II. Basic Principles

- A. *Responsibility under international law*
- B. *Official position / heads of state*
(Article 7, Statute of Yugoslavia Tribunal)

III. Elements of a crime

- A. *Objective (actus reus)*
 - 1. Age of Responsibility²
 - 2. Voluntary conduct
 - 3. Act or omission
 - 4. Causation and accountability
- B. *Subjective (mens rea)*
 - 1. intention, recklessness/dolus eventualis or negligence
 - 2. Guilt (personal responsibility)
 - 3. Exclusion of strict liability for individuals
 - 4. Criminal liability of corporations

IV. Defences (Justification and Excuse)

- A. *Criminal Law Defences*
 - 1. Lesser of evils
 - 2. Necessity
 - 3. Self Defence
 - 4. Defence of others

2. Some members wanted to insert this problem under IV.A.

5. Defence of property
6. Law enforcement/other authority
7. Consent of victim
8. Mental capacity
 - a. Insanity
 - b. Intoxication
 - c. Other diminished capacity
9. Duress/coercion/force majeure
10. Mistake of fact
11. Mistake of law
12. Superior orders

B. Public International Law Defences

1. Art. 51 of the UN Charter
2. Military necessity
3. Reprisals

V. Limits of responsibility/obstacles to prosecution

A. Statute of Limitations

B. State responsibility vs. individual responsibility

VI. Special manifestations of crimes

A. Incomplete crimes

1. Attempts (withdrawal)
2. Solicitation (withdrawal)
3. Conspiracy (withdrawal)

B. Complicity

C. Command responsibility

VII. Punishment

A. Mitigation / Aggravation

- Repentance, restitution, active cooperation

B. Penalty structure

1. imprisonment (conditionally suspended sentence?)
2. fines

3. restitution/forfeiture/confiscation

C. Amnesty, clemency, parole, pardon (See Article 60)

The outline groups together defences that might be classified as justifications or excuses under national legal codes, beginning with those that most systems would treat as justifications. No line is drawn between these defences because different systems might prefer different delineations. Further development of a general part will require a decision on whether and where to draw such a line.

A distinction is drawn between criminal law defences and public international law defences because the former flow simply from criminal law norms, while the latter will have to be derived through analysis of public international law principles and incorporated into the present general part.

The omission of a defence in the nature of *tu quoque*, in which an accused might escape punishment by pointing to similar conduct by others that has gone unpunished, is intentional. Although such a defence was argued at Nuremberg, the argument failed because it has no place in any modern criminal law system. In connection with crimes of the kind to be tried by the International Criminal Court—which have largely evaded prosecution until now—such a defence would defeat the purpose of the Court.

In the future, attention should be given to sentencing, including possible ranges or guidelines for different classes of offences, such as property crimes, crimes involving bodily harm, and crimes involving death or risk of death.

It should be noted that this General Part must be used in conjunction with a Special Part. In the proposed Draft Statute the Special Part is described in Article 20, which bears the narrow label, Jurisdiction, but which actually defines the specific conduct to be punished.

At present the ILC is continuing work on a Draft Code of Offences Against the Peace and Security of Mankind, which will contain General Part provisions as well as definitions of

relevant offences.

Article 34
Challenges to jurisdiction

Challenges to the jurisdiction of the Court may be made, in accordance with the Rules:

- (a) prior to or at the commencement of the hearing, by an accused or any interested State; and*
- (b) at any later stage of the trial, by an accused.*

Article 35
Issues of admissibility

The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:

- (a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently wellfounded;*
- (b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or*
- (c) is not of such gravity to justify further action by the Court.*

Article 36
Procedure under articles 34 and 35

- 1. In proceedings under articles 34 and 35, the accused and the complainant State have the right to be heard.*
- 2. Proceedings under articles 34 and 35 shall be decided by the Trial Chamber, unless it considers, having regard to the importance of the issues involved, that the matter should be referred to the Appeals Chamber.*

Article 37
Trial in the presence of the accused

1. As a general rule, the accused should be present during the trial.
2. The Trial Chamber may order that the trial proceeds in the absence of the accused if:
 - (a) **the accused expressly waives the right to be present;**
 - (b) **the accused continuously disrupts the trial; or**
 - (c) **after the commencement of the trial the accused has escaped from lawful custody under this Statute or has violated the terms of bail.**
3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular that the accused is legally represented, **if not by his own counsel then by counsel appointed by the Court.**
4. In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of recording the evidence. **In such proceedings, the Chamber shall ensure that the accused is legally represented, if not by his own counsel then by counsel appointed by the Court.**
5. If the accused is subsequently tried under this Statute:
 - (a) the record of evidence before the Indictment Chamber shall be admissible.
 - (b) any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

Reasons for the changes:

There are many problems with allowing trials in absentia before an International Criminal Court. Such trials may violate the right of the accused to be present at trial, as guaranteed by the International Covenant on Civil and Political Rights. Moreover, if the Court allowed such trials,

it could quickly come to be viewed as merely a paper tiger used only as a forum for show trials. This would diminish its authority by creating the image of a powerless institution issuing nothing more than hollow judgments without any effect in terms of punishment or deterrence. Furthermore, because such trials would have to be repeated if the accused appears or can be brought to trial at a later stage, they would burden the limited financial and human sources of the Court. For these reasons, the Statute and Rules of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) prohibit in absentia trials.

On the other hand, there is no compelling reason not to permit trials in the absence of the accused when the accused either expressly or implicitly waives the right to be present at trial. Implicit waiver, however, must be narrowly construed so as to include only escaping from custody or breaking bail after the commencement of the trial, or acting in a disruptive manner during the trial despite warnings from the Court. The changes in paragraph 2 restrict trials in the absence of the accused to these three categories of cases.

Rather than confining in absentia trials to such exceptional cases, the ILC Draft Statute would allow such trials "if for reasons of security it is undesirable for the accused to be present" -- notwithstanding the accused's fundamental right of confrontation.

The ILC Draft would also allow trials in absentia when the accused has become ill, whereas a more appropriate approach in such cases would be to postpone the proceedings. In addition, the ILC Draft would allow trials in absentia when the accused has escaped from the lawful custody of domestic authorities prior to being surrendered to the Court - a situation that raises the same general concerns about in absentia trials as those discussed above.

The deletion of paragraph 3 (a) of the ILC Draft is a logical consequence of the formulation of the new paragraph 2 (c), according to which a trial in the absence of the accused may proceed where the person concerned has either escaped from custody or has broken bail, after the commencement of the

trial, and therefore had already been informed of the charge.

The change in paragraph 3 (b) merely clarifies that the accused must be represented by Counsel, but not necessarily by a “lawyer,” and that, if the accused’s Counsel does not represent him, that the Court will appoint counsel for that purpose.

The deletion of paragraph 4 (a) of the ILC Draft is based on the assumption that the Court has made a finding of a *prima facie* case already at the time it had confirmed the indictment, and that this provision would therefore require the Court to engage in a redundant procedure.

Paragraph 4 (c) of the ILC Draft is to be deleted. This provision is inherently political, rather than judicial, and redundant because the Court is entitled already to issue an arrest warrant under other provisions of the Statute, such as Article 26.

Article 38

Functions and powers of the Trial Chamber

1. At the commencement of the trial, the Trial Chamber shall:

- (a) have the indictment read*
- (b) ensure that articles 27 (5) (b) and 30 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;*
- (c) satisfy itself that the other rights of the accused under this Statute have been respected; and*
- (d) allow the accused to enter a plea of guilty or not guilty.*

2. The Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. The Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual situation.

4. *The trial shall be held in public, unless the Chamber determines that certain proceedings be in closed session in accordance with article 43, or for the purpose of protecting confidential or sensitive information which is to be given in evidence.*

5. *The Chamber shall, subject to this Statute and the Rules have, inter alia, the power on the application of a party or of its own motion, to:*

- (a) issue a warrant for the arrest and transfer of an accused who is not already in the custody of the Court;*
- (b) require the attendance and testimony of witnesses;*
- (c) require the production of documentary and other evidentiary materials;*
- (d) rule on the admissibility or relevance of evidence;*
- (e) protect confidential information; and*
- (f) maintain order in the course of a hearing*

6. *The Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.*

Observations on Article 38 para. 1 (d)

In common law jurisdictions, a plea of guilty or not guilty is closely linked to the jury system. If the accused pleads guilty there is no need for trial by jury.

The ILC Statute does not provide for trial by jury; a trial under the Statute might be compared to a bench trial in a common law system. Hence the question whether an accused pleads guilty or not loses much of its importance. Its importance is, moreover, further reduced by the fact that the Statute does not **require** the accused to enter a plea of guilty or not guilty. On the other hand, according to the Commentary to Article 38, a plea of guilty will not necessarily mean a summary end to the trial or an automatic conviction. The Commentary adds: "In many cases it may be prudent to hear the whole of the prosecution case; in others only the key witnesses may need to be called to give evidence,

or the material before the Court combined with the confession will themselves be certain proof of guilt”.

It might be argued, therefore, that a reference to a plea of guilty should better be deleted. Since, moreover, the Court is dealing with international crimes and since international society has a right to know about the merits of a case, it would seem hardly acceptable that, as a consequence of a guilty plea, the Court may dispense with reviewing all the available evidence. Also, because the accused is not required to enter a plea of guilty or not guilty, the reference to these pleas in the Statute could be deleted. One may leave it to the Court's discretion and that of the parties how thoroughly the evidence will be discussed if the defence does not deny the charges.

On the other hand it might be argued that Art. 38 should be amended in a way that provides for an obligation of the accused to enter a plea of guilty or not guilty. In this respect the Statute should follow the example of Rule 62 of the Rules of Procedure and Evidence adopted by the Yugoslavia Tribunal.

Article 39

Principle of legality (nullum crimen sine lege)

An accused shall not be held guilty:

- (a) in the case of a prosecution with respect to a crime referred to in article 20(a) to (d), unless the act or omission in question constituted a*
- (b) crime under international law; in the case of prosecution with respect to a crime referred to in article 20 (e), unless the treaty in question was applicable to the conduct of the accused at the time the act or omission occurred.*

Article 40

Presumption of innocence

An accused shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond reasonable doubt.

Article 41
Rights of the accused

1. In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 43, and to the following minimum guarantees:

- (a) to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge;
- (b) to have adequate time and facilities for the preparation of the defence, and to communicate with counsel of the accused's choosing;
- (c) to be tried without undue delay;
- (d) subject to article 37 (2), to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court, without payment if the accused lacks sufficient means to pay for such assistance;
- (e) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;
- (f) if any of the proceedings or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;
- (g) not to be compelled to testify or to confess guilt.

2. The Prosecutor shall, as soon as practical, disclose to the defense the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

Reasons for the changes:

The changes affect only Article 41 paragraph 2 of the ILC

Draft.

New paragraph 2 replaces the language contained in original paragraph 2 with the language used in Amended Rule 68 of the Yugoslavia Tribunal. In addition to including what is called in the U.S. "Brady material" (i.e., exculpatory information), the new text requires the disclosure of what is known in the U.S. as "Giglio material," that is, evidence that tends to impeach the testimony of a prosecution witness. See Brady v. Maryland 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972).

Art. 42
Ne bis in idem

1. No person shall be tried before any other court for acts constituting a crime of the kind referred to in article 20 for which that person has already been tried by the Court.
2. A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this Statute only if:
 - (a) the acts in question were characterized by the court as an ordinary crime and not as a crime which is within the jurisdiction of the court; or
 - (b) the proceedings - **including clemency, parole, pardon, amnesty and other similar relief** - were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.
3. **In considering the penalty to be imposed on a person convicted under this Statute, the Court shall take into account any deprivation of liberty or penal sanction pronounced by another court and suffered by the same person for the same act. However, credit shall be given for remand in custody.**

Reasons for the changes:

The revision to paragraph 2 (b) is necessary to clarify that the exception to the ne bis in idem principle for sham proceedings extends beyond trial, and includes clemency,

parole, amnesty, pardon, and other proceedings that were used, for example, by Germany after World War I to frustrate efforts to establish criminal responsibility of convicted German war criminals.

In this respect, at the time of voting on Resolution 827, the United States emphasized that “with respect to Article 10, it is our understanding that the Tribunal is authorized to conduct proceedings against persons previously tried by a national court for the same crime when national proceedings - including clemency, parole, and other similar relief - were not impartial or independent, were designed to shield the accused from international criminal responsibility, or were not diligently prosecuted.”

The addition of paragraph 3 leaves it to the Court to determine in each individual case the necessary measures for taking into account any sanction already suffered for the same act by the convicted person. The last sentence clarifies that there must be correspondence with Art. 47 para. 4.

Article 43

Protection of the accused, victims and witnesses

1. The Court shall take necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means, **provided that the measures are consistent with the rights of the accused.**

2. **The Court shall ensure the safety of the accused, victims and witnesses, as well as that of their families, from intimidation and retaliation before, during and after the trial. To this end a Victims and Witness Service shall be established. The Court may request all States Parties to cooperate with the Service in order to provide adequate protection to victims and witnesses.**

Reasons for the changes:

As drafted by the ILC, Art. 42 may be read as elevating the

rights and interests of victims and witnesses over those of the accused. There may be cases in which protection of witnesses cannot be consistent with the accused's right of confrontation. The U.S. Supreme Court expressed the importance of this right as follows: "Face-to-face confrontation generally serves to enhance the accuracy of fact finding by reducing the risk that a witness will wrongfully implicate an innocent person." See *Maryland v. Craig*, 497 U.S. 836, 846 (1990). The proposed revision to paragraph 1, which is based on the language of Rule 75 of the Rules of Procedure and Evidence of the Yugoslavia Tribunal, would make clear that protective measures for witnesses must be consistent with the basic rights of the accused, including the right to confront all accusatory witnesses.

As experience in the former Yugoslavia and Rwanda shows, victims and witnesses who may have to appear before an International Tribunal are extremely vulnerable and in need of protection. Article 43 of the Statute, as well as Article 38 (2) and (4), take account of that fact in various ways. To shield the identity of a witness from the accused or third persons on a permanent basis, however, is not possible since that would necessarily infringe upon the accused's right to examine, or have examined, the prosecution's witnesses. As drafted, the Statute offers victims and witnesses little or no protection against intimidation or retaliation that may occur after the trial. This will make witnesses extremely reluctant to appear before the Court. A victim and witness protection programme is therefore a necessity. For this programme to be effective, the cooperation of State parties is indispensable.

The language of the first sentence in proposed new paragraph 2 is derived from the 1985 UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power (GA Res 40734). It is deliberately phrased in a way that makes it possible to argue that victims and witnesses have an individual right to protection. The second sentence is derived from Rule 34 of the Yugoslavia Tribunal's Rules. For merely practical reasons, the Court will have to determine whether the Service should function within the Office of the Prosecutor or under the auspices of the Court.

The first option might be more practical, effective, and efficient.

The second option is likely to ensure a higher degree of objectivity and impartiality in giving protection to persons, including defense witnesses.

Article 44 Evidence

1. The Rules of Evidence set forth in this Article shall govern the proceedings before the Court. The Court shall not be bound by national rules of evidence.

2. In cases not otherwise provided for in this Article, the Court shall apply rules of evidence which will best favor a fair determination of the matter before it and are consistent with the spirit of the Statute and the general principles of law.

3. The Court may require to be informed of the nature of any evidence before it is offered so that it may rule on its relevance or admissibility.

4. A document, audio-recording, or video-recording containing a statement of a person other than the accused, which was given before a judge of the court of a State party, is admissible in evidence when that person is not able to testify before the Court because of death, illness, injury, old age, or other good cause.

5. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

6. No evidence shall be admissible if obtained by methods which constitute a serious violation of internationally protected human rights or which otherwise cast substantial doubt on its reliability or if its admission is antithetical to, and would, seriously damage the integrity of the proceedings.

7. Before testifying, each witness shall, in accordance with

the Rules, give an undertaking as to the truthfulness of the evidence to be given by that witness.

8. The witness shall be excused from the duty to testify in regard to:

- (a) **communications between lawyer and client, which shall be regarded as privileged, and not subject to disclosure at trial, except provided for by the Rules.**
- (b) **communications between other categories of privileged relationships identified by the Court in its Rules and subject to the exceptions provided for by the Rules.**
- (c) **statements which may tend to incriminate the witness.**

9. Subject to paragraph 8 above, a witness who refuses or fails contumaciously to answer a question relevant to the issue before the Court may be found in contempt of the Court. In such cases, the Court may impose a fine not exceeding US\$10,000 or a term of imprisonment not exceeding six months, or both. Rulings under this paragraph shall be immediately appealable to the Appeals Chamber.

10. If the Court has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may order the witness provisionally detained and direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony. The matter shall be immediately tried before a different panel of judges. The maximum penalty for false testimony under solemn declaration shall be a fine of US\$20,000 or a term of imprisonment of twelve months, or both. Rulings of the Court under this paragraph shall be immediately appealable to the Appeals Chamber.

In addition, States parties shall extend their laws of perjury to cover sentence given under this Statute by their nationals, and shall cooperate with the Court in investigating and where appropriate prosecuting any case of suspected perjury.

Reasons for the changes:

New Paragraphs 1 and 2, which follow the provisions of Rule 89 (a) and (b) of the Yugoslavia Tribunal, establish the general standard for the Court's Rules, i.e., the Court is to promulgate and apply Rules which will best favour a fair determination of the matters before it and which are consistent with the spirit of the Statute and the general principles of international law.

New Paragraph 4 provide an exception to the "orality principle" (rule against hearsay) for prior testimony before a judicial officer if the witness is not able to appear before the Court because of death, illness, injury, old age, or other good cause of a similar nature.

Paragraph 6 revises the exclusionary rule. Art. 44 (5) of the ILC Draft, which excludes evidence obtained by means which violate "other rules of international law," is too vague and overly broad. The proposed revision would replace this language with the more explicit phrase "methods which constitute a serious violation of internationally protected human rights or which otherwise cast substantial doubt on its reliability." This language, which refers to the rights enumerated in widely ratified International Treaties, such as the Torture Convention, provides a uniform standard for determining the admissibility of evidence before the Court. As revised, the exclusionary rule would discourage human rights violations in the gathering of evidence; exclude evidence obtained by illegal means, such as torture, for reasons of unreliability; avoid tainting the judicial process; and protect the fundamental interests of justice with respect to due process and the rule of law.

Paragraph 8 provides that the witness has a right to refuse to testify *inter alia* in case the statement might tend to incriminate the witness. This is a departure from the Yugoslavia Rules, which provide that the witness does not have such a right, but that the witness is given immunity from the use of such statements in national and international prosecution.

The departure is justified because the Permanent

International Criminal Court which, unlike the Yugoslavia Tribunal, is not established by a binding Chapter VII-Resolution of the Security Council, could not guarantee “use immunity” by national prosecutions.

Paragraph 8 also establishes the attorney-client privilege and authorizes the Court to provide other similar privileges (and exceptions thereto) in its Rules, such as the doctor-patient privilege, the husband-wife privilege, and the clergy-faithful privilege.

New Paragraphs 9 and 10 address the question of the “secondary” jurisdiction of the Court in cases of perjury or contempt of court that are incidental to its own proceedings. As the U.S. Supreme Court pointed out long ago: “the power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts and, consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.” *Ex Parte Robinson*, 19 Wall. (86 U.S.) 510. The new paragraphs 9 and 10 would ensure the Court’s jurisdiction with respect to the crime of false testimony and contempt of court and grant it the authority to impose sanctions therefore. For cases where the person suspected of perjury is not available or accessible to the Court, the new Paragraph 10 retains the provision of the language in the ILC Draft requiring States parties to cooperate in investigating and where appropriate prosecuting any case of suspected perjury.

Article 45

Quorum and judgment

- 1. At least four members of the Trial Chamber must be present at each stage of the trial.*
- 2. The decisions of the Trial Chamber shall be taken by a majority of the judges. At least three judges must concur in a decision as to conviction or acquittal and as to the sentence to be imposed.*

3. *If after sufficient time for deliberation a Chamber which has been reduced to four judges is unable to agree on a decision, it may order a new trial.*

4. *The deliberations of the Court shall be and remain secret.*

5. *The judgment shall be in writing and shall contain a full and reasoned statement of the findings and conclusions. It shall be the sole judgment issued, and shall be delivered in open court.*

Article 46
Sentencing

1. *In the event of a conviction, the Trial Chamber shall hold a further hearing to hear any evidence relevant to sentences, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed.*

2. *In imposing sentence, the Trial chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.*

Article 47
Applicable penal sanctions

The Court may impose on a person convicted of a crime under this Statute one or more of the following penal sanctions:'

(a) a term of life imprisonment or

(b) imprisonment **for a time not less than one year and in addition**

(c) **an appropriate fine.**

2. **The Court may also order the confiscation of the proceeds of or the instruments used for the commission of the crime as well as decide on forfeiture.**

3. **In determining the length and enforcement of a term of imprisonment or the amount of a fine to be imposed, the**

Court will have regard to the general practice of States, and may specifically have regard to the penalties provided for by the law of:

- (a) the State where the crime was committed;
- (b) the State of which the convicted person is a national;
and
- (c) the State which had custody of and jurisdiction over the accused.

4. Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.

5. Proceeds from fines, forfeiture and confiscated property may be transferred, by order of the Court, to one or more of the following:

- (a) a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime;
- (b) a State the nationals of which were the victims of the crime;
- (c) the Registrar, to defray the costs of the trial.

Reasons for the changes:

Because of the gravity of the crimes, Paragraph 1 should be revised to indicate that fines, by themselves are not an appropriate penalty and that the minimum sentence should be no less than one year.

A new Paragraph 2 is required to deal with the important aspect of forfeiture and confiscation, which was omitted in the ILC-Draft. The importance of this matter, as well as of the solution, in Paragraph 5, of the question who is to receive the proceeds from fines, confiscation and forfeiture, will obviously grow in case the Court acquires jurisdiction to try not only the offences referred to in Art. 20 (a) - (d), but also those referred to in Art. 20 (e) and relating, as the case may be, to e.g. international drug traffic.

The change to paragraph 3 indicates that the Court will have recourse to the sentencing provisions and practice of certain

States concerning the appropriate sentence for grave international crimes. This will allow more uniformity over time than if the Court merely imported the sentencing practice of a particular State for this purpose.

The order of Art. 47 cont. paragraph 3 (a) and paragraph 3 (b) are reversed to reflect the view that the sentencing law of the State where the crime was committed is more important than that of the State of nationality of the offender for the purpose of determining an appropriate sentence.

New paragraph 4 is the language of Rule 101 (E) of the Yugoslavia Tribunal's Rules, which makes clear that credit must be given for time served during the course of proceedings. Any deprivation of liberty by another court is covered by Art. 42, para. 3.

The order of paragraph 5 (a) - (c) are reversed to indicate that priority should go to compensating victims directly. Consideration about defraying Court costs should be of least importance in this context.

...

PART 6. APPEAL AND REVIEW**Article 48****Appeal against judgment or sentence**

1. The Prosecutor or the defendant may appeal immediately against pre-trial rulings based on questions of jurisdiction or exclusion of evidence where it is shown that such ruling will have a reasonable likelihood of causing serious impairment to the prosecution or defense.

2. The Prosecutor and or the convicted person may, in accordance with the Rules, appeal against a decision under article 45 on grounds of:

- (a) procedural error or errors on a question of law invalidating the decision; or
- (b) an error of fact **which allegedly has resulted in a miscarriage of justice.**

3. The Prosecutor and the convicted person may, in accordance with the Rules, appeal the sentence imposed.

4. Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending on appeal.

Observations on Article 48

The U.S. constitutional prohibition of double jeopardy prohibits the prosecution from appealing acquittals. The prohibition is not against being twice punished, but against being twice forced to stand trial for the same offense. There are two important rationales for the rule. One rationale is that the trial itself is a great ordeal, and once the defendant is acquitted, the ordeal must end. *See U.S. v. Ball*, 163 U.S. 662, 669 (1896). The other is based on the increased risk of an erroneous conviction that may occur if the state, with its superior resources, were allowed to retry an individual until it finally obtained a conviction. *See Green v. United States*, 355 U.S. 184, 187-188 (1957) and *United States v.*

DiFrancesco, 449 U.S. 117, 130 (1980). These rationales are just as applicable to prosecution before an international criminal court as to domestic prosecutions. The ICC Prosecutor, together with State authorities assisting the Prosecutor, will have the full resources of the court and several interested States behind it, while defendants and their counsel will be acting alone to refute guilt.

Reasons for the changes:

The proposed new Paragraph 1 would allow the Prosecutor and the Defense to appeal pretrial rulings based on questions of jurisdiction or exclusion of evidence. Such interlocutory appeals would be immediately disposed of by the Appellate Chamber prior to the commencement of the trial. The standard for such appeals is a high one: The Appellate Court will immediately entertain the appeal only where it is shown that failure to do so is reasonable likely to cause serious impairment to the prosecution or defense.

Regarding the issue of whether the Prosecutor should be able to appeal an acquittal based on errors of fact, the new text in Paragraph 2 is similar to the original version of the ILC - Draft. Given the gravity of the crimes to be tried, it is justifiable to allow the Prosecutor to appeal an acquittal.

However, it must be stressed that Art. 49 authorizes the Appeals Chamber to order a new trial before a different trial chamber in case it accepts an appeal by the Prosecutor against an acquittal. This might affect the accused's legitimate desire for finality (which is at the core of the U.S. concept of "double jeopardy"), and expose the International Criminal Court to criticism for lacking the appearance of even handedness. Yet, one should not lose sight of the fact that there is no jury trial before the Court and the "double jeopardy" prohibition in this context refers to a system of lengthy and costly jury trials.

Finally, to avoid appeals on frivolous grounds, a requirement is added that would require that errors of fact rise to the level of "a miscarriage of justice." Similarly, an error of law would have to be of a nature as to "invalidate the decision." These criteria are taken from Art. 25 of the Yugoslavia

Statute.

Article 49
Proceedings on appeal

1. *The Appeals Chamber has all the powers of the Trial Chamber.*
2. *If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may:*
 - (a) *if the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial;*
 - (b) *if the appeal is brought by the prosecutor against an acquittal, order a new trial.*
3. *If an appeal against sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with article 47.*
4. *The decision of the Chamber shall be taken by a majority of the judges, and shall be delivered in open court. Six judges constitute a quorum.*
5. *Subject to article 50, the decision of the Chamber shall be final.*

Article 50
Revision

1. *The convicted person or the Prosecutor may, in accordance with the Rules, apply to the Presidency for revision of a conviction of the ground that evidence has been discovered which was not available to the applicant at the time the conviction was pronounced or affirmed and which could have been a decisive factor in the conviction.*
2. *The Presidency shall request the Prosecutor or the convicted person, as the case may be, to present written observations on whether the application should be accepted.*
3. *If the Presidency is of the view that the new evidence*

could lead to the revision of the conviction, it may:

- (a) reconvene the Trial Chamber;*
- (b) constitute a new Trial Chamber; or*
- (c) refer the matter to the Appeals Chamber;*

with a view to the Chamber determining, after hearing the parties, whether the new evidence should lead to a revision of the conviction

...

PART 7. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 51
Cooperation and judicial assistance

- 1. States parties shall afford to the Court the widest possible measures of judicial assistance in connection with any investigations and proceedings under this statute.**
- 2. The Registrar may transmit to any State party a request for cooperation and judicial assistance according to article 57 with respect to a crime under article 20, including, but not limited to:**
 - (a) the identification and whereabouts of persons;**
 - (b) the taking of testimony and the production of evidence;**
 - (c) the service of documents;**
 - (d) the arrest or detention of persons; or**
 - (e) any other assistance which the Court may require, including provisional measures.**
- 3. In a case covered by**
 - (a) article 20 (a) to (d), all State parties;**
 - (b) article (e), State parties which have accepted the jurisdiction of the Court with respect to the crime in question, shall respond without undue delay to the request.**
- 4. A State party may, within 28 days of receiving a request under paragraph 2, file a written application with the Registrar requesting the court to set aside the request on specified grounds. Pending a decision of the Court on the application, the State concerned may delay complying with paragraph 3 but shall take any provisional measure necessary to ensure that assistance can be given at a later moment.**
- 5. The Court shall ensure the confidentiality of evidence and information except as needed for the**

investigation and proceedings described in the request.

Reasons for the changes:

Art. 51 paras. 1 and 5 are taken from the UN-Model Treaty on Mutual Assistance in Criminal Matters as an expression of generally accepted world-wide practice.

Art. 51 para. 4 adjusts to art. 53 para. 6 of the ILC-Draft with view to cooperation and judicial assistance. As to the period of now 28 days, see the differentiation in art. 52.

Article 52
Provisional measures

1. In case of **urgency**, the Court may request a State **party** to take necessary provisional measures, including:

- (a) **the provisional arrest of** a suspect;
- (b) **the seizure of** documents or other evidence;
- (c) **measures designed to protect witnesses against injury or intimidation.**

2. Where the Court has **requested a provisional measure** under paragraph 1, **it shall** as soon as possible and in any case within 28 days, **make** a formal request for assistance **in conformity** with article 57.

3. **Provisional arrest may be terminated if, within a period of 28 days after the arrest, the requested State Party has not received the request for surrender and the documents mentioned in article 57. It shall not, in any event, exceed 40 days from the date of such arrest. The possibility of provisional release at any time is not excluded, but the State Party shall take any measures which it considers necessary to prevent the escape of the person sought.**

Reasons for the changes:

Art. 52 para. 3 sentences 1 and 2 take over a well-established differentiation between facultative and mandatory termination of provisional arrest Sentence 3 is a mere clarification.

Article 53
Surrender of an accused to the Court

1. The Registrar shall transmit to any State on the territory of which the accused may be found **the** warrant for the arrest and transfer of an accused issued under article 28 (3), and shall request the cooperation of that state in the arrest **and** **surrender** of the accused.
2. The requested State party shall, subject to paragraphs 8 and 9, take immediate steps to arrest and surrender the accused to the Court if the case is covered by
 - (a) articles 20 (a) to (d) [(a) or article 23 (1)1, or
 - (b) if the requested State has accepted the jurisdiction of the Court with respect to the crime in question;
3. The requested State party, if it is a party to the treaty covered by article 20 (e) and has accepted the jurisdiction of the Court, shall give priority to surrender the accused to the Court over requests for extradition from other States.
4. In the case of a crime to which article 20 (e) applies, the **requested State party, if it is a party to the treaty in question but has not accepted the Court's jurisdiction with respect to that crime shall, where it decides not to surrender the accused to the Court, promptly take all necessary steps to extradite the accused to a State having requested extradition or refer the case to its competent authorities for the purpose of prosecution.**
5. In any other case, **the requested State party shall consider whether it can, in accordance with its legal procedures, take steps to arrest and surrender the accused to the Court, or whether it should take steps to extradite the accused to a State having requested extradition or refer the case to its competent authorities for the purpose of prosecution.**
6. The surrender of an accused to the Court constitutes, as between States parties which accept the jurisdiction of the

Court with respect to the crime in question, compliance with a provision of any treaty requiring that a suspect be extradited or the case be referred to the competent authorities of the requested State for the purpose of prosecution.

7. A State party which **has** accepted the jurisdiction of the Court with respect to the crime in question shall, where ever possible, give priority to a request under paragraph 1 over requests for extradition from other States.

8. **The requested** State party may delay complying with a request under paragraph 2 - 4 if the accused is in its custody or control and is being proceeded against for a serious crime, or serving a sentence imposed by court for a crime. It shall within **28** days of receiving the request inform the Registrar of the reasons for the delay. In such cases it

- (a) may agree to the temporary **surrender** of the accused for the purpose of standing trial under this Statute; or
- (b) shall comply with **the request under** paragraph 2 - 4 after the prosecution has been completed or abandoned or the sentence has been served, as the case may be.

9. A State party may, within **28** days of receiving a request under paragraph 1, file a written application with the Registrar requesting the Court to set aside the request on specified grounds **including those mentioned in articles 35 and 42**. Pending a decision of the Court on the application, the State concerned may delay complying with paragraph 2 - 4 but shall take any provisional measures necessary to ensure that the accused remains in its custody or control.

10. **To the extent permitted under the law of the requested State and subject to the rights of third parties, all property found in the requested State that has been acquired as a result of the alleged offence or that may be required as evidence shall, upon request, be transmitted to the Court if surrender is granted, even if the surrender can not be carried out, on conditions to be determined by the court.**

Reasons for the changes:

This article is the core provision for filling the gap between the Court and national authorities which are to get hold of a suspect. The article has been restructured and supplemented.

Art. 53 para. 2 - 4 (5) depend on the final version of arts. 20 subs. They restructure para. 2 of the ILC-Draft. Para 4 integrates art. 54.

Para. 6 - 9 are adaptations (including renumbering) to existing treaty and convention practice. As to the time limits in para. 8, see art. 52 in the proposed new version.

Para. 10 was necessary with view to confiscation, forfeiture and means of evidence (see art. 13 of the UN-Model-Treaty on Extradition).

Article 54
Obligation to extradite or prosecute

- Delete - see Art. 53 para. 4.

Article 55
Rule of speciality

1. A person **surrendered** to the Court under article 53 shall not be **proceeded against, sentenced or detained** for any crime other than that for which the person **has been surrendered**.

2. A State **providing evidence** under this Part **may require that the evidence not** be used for any purpose other than that for which it was provided, unless this is necessary to preserve a right of an accused under article 41 (2).

3. The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes to be specified in the request. **In a case of paragraph 1, the request shall be accompanied by an additional warrant for arrest and by a legal record of any statement made by the accused with respect to the**

offence.

Reasons for the changes:

Art. 55, Para. 1 clarifies that the rule of speciality applies.

Para. 3, sentence 2 clarifies that - according to general practice in extradition matters - enlarging the purpose of surrender requires the basis of a warrant of arrest and - if available - a statement of the accused.

Article 55a

No surrender to another state

Except as provided for in article 55, the Court shall not, without the consent of the requested State party, surrender to another Party or third State a person surrendered to the Court and sought by the other Party or third State in respect of offences committed before his surrender. The requested Party may request the production of the documents mentioned in article 57.

Reasons for the changes:

According to general practice in transfer and extradition matters Article 55 prevents the Court from re-surrendering a surrendered person to any other than the surrendering State without the consent of the latter, because surrender was only granted to the Court and not to other States.

Article 56

Cooperation with States not parties to this Statute

The Court may call on any State not a party to this Statute to provide assistance.

Reasons for the changes:

The proposed new wording reduces the original text by using the term "call on" which expresses that there is no obligation of States not Parties to this Statute to assist the Court.

Article 56a
Support by the Security Council

In case of application of article 23, the Court may request the Security Council to take the measures necessary for the Court to exercise its jurisdiction, in relation to both States parties to this statute or States not parties.

Reasons for the changes:

If the Security Council is dealing with the underlying matter under Chapter VII of the Charter of the United Nations (see art.23), the Court should be able to make use of the wide-ranging powers of the Security Council in relation to UN-Member-States, both States parties and not parties to this Statute.

This provision aims at supporting efforts of the Court to show that - in a situation governed by art. 23 - any State's refusal to cooperate is detrimental to the overall aims of international society.

Article 57
Form and contents of requests

1. Requests under this Part shall
 - a) be made by letter, fax, e-mail or any medium capable of delivering a written record and
 - b) contain the following, as applicable:
 - i) a brief statement of the purpose of the request and the assistance sought including the legal basis and grounds for the request;
 - ii) information regarding the person who is the subject of the request in sufficient detail to enable identification;
 - c) a brief description of the essential facts underlying the request;
 - d) information concerning the complaint or charge to which the request relates and of the basis for the Court's jurisdiction and

- e) in a case covered by Article 28: a written warrant for the provisional arrest or a written warrant for the arrest and surrender of the accused.

3. Where the requested party considers the information provided insufficient to allow it to comply with the request, it may seek, without delay, additional information.

Reasons for the changes:

Art. 57 of the ILC-Draft has been divided into two provisions concerning "Form and Contents" of (art. 57) and "Channels of Communication" for (art. 57 a) requests. Para. 1 (a) makes clear that new technologies may be used.

Para. 1 (e) requires at least a written warrant of arrest, which reflects constant state practice in extradition based on procedural safeguards. Furthermore, a warrant of arrest is a minimum condition for surrender/extradition under most, if not all, domestic laws.

The purpose of para. 3 is to accelerate proceedings.

Article 57a
Channels of communication

1. Communications relating to a request under this Part shall be between the Registrar and the national authority designated by each Party for this purpose.

2. Where appropriate, communications may be made through the International Criminal Police Organization.

Reasons for the changes:

See Art. 57.

...

PART 8. ENFORCEMENT**Article 58
General rule**

States parties undertake to abide by the judgments of the Court.

Reasons for the changes:

By replacing the word „recognize” by the word „abide”, it will be clear that all States parties henceforth legally bound by the judgments of the Court, including the legal consequences attached thereto. (The assumption that States parties will consider the Court as either a part or an emanation of their own domestic jurisdiction - a kind of a new Supreme Court - and therefore be bound automatically by its judgments, cannot easily be drawn from the constitutional law of States likely to accede to this Statute).

**Article 59
Enforcement of sentences**

1. A sentence of imprisonment shall be served in a State designated by the Court from the list of States which have indicated to the Court their willingness to accept convicted persons (**the administering State**). **To that end, the Court shall provide the State so designated with a certified copy of the judgment to be enforced. The state so designated shall promptly inform the Court whether it accepts the request.**

2. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host **State (which acts as administering State)**.

3. **The consent of the sentenced person is not required.**

4. A sentence of imprisonment shall be subject to the supervision of the Court and be **enforced**

- as pronounced by the Court

- in accordance with the applicable law of the administering State.

5. The same applies mutatis mutandis to the enforcement of fines and confiscatory measures. The proceeds therefrom shall be handed over to the Court, which will dispose thereof in accordance with Article 47 paragraph 4.

6. The Court alone shall have the right to decide on any application for review of the judgment. The administering State shall not impede the sentenced person from making any such application.

7. A sentenced person in the custody of the administering State shall not be subjected to prosecution or punishment for any conduct committed prior to transfer unless such prosecution or punishment has been agreed to by the Court.

Reasons for the changes:

Art. 59 para. 1: Insofar as cooperation regarding a State's acceptance of convicted persons for the purpose of enforcing their prison terms, takes place on a voluntary basis, a State having made such an offer remains free to decline its cooperation in a specific case. One of the grounds which need not be listed, may be that a State is asked to enforce a sentence in respect of an offence for which it has not recognized explicitly the Court's jurisdiction. What matters is that the State be informed by the Court of what judgment and sentence it is asked to enforce, and that the State then promptly informs the Court whether it accepts the request.

Art. 59 para. 3: Insofar as various international treaties dealing with the transfer of sentenced persons from the sentencing to the administering State require explicitly the consent of the person concerned, it was necessary to clarify that the enforcement of a sentence of the Court which has no prison facilities of its own, is a wholly different matter and therefore the consent of the sentenced person is irrelevant.

Art. 59, para. 4: The new text excludes any "conversion procedure" and requires the administering State to enforce

the sentence as pronounced by the Court, which amounts to the “continued enforcement” option in the international treaties referred to above. The requirement that the Court alone is entitled to modify in any aspect its judgment, is reflected as well in Art. 59, para. 6, and Art. 60 (*infra*). All the administering State is called upon is to enforce the Court’s sentence on behalf of the Court, and it is only in this respect that the applicable law of the administering State will be of any relevance.

If, at a later stage, a large number of offenders are tried and sentenced by the Court following an extension of its jurisdiction to various crimes provided for by the international treaties referred to in Art. 20 (e) of the ILC-Draft-Statute, the enforcement procedures foreseen in the present text may have to be modified with a view to giving the administering States a more important task in the enforcement of the sentences of the Court.

Art. 59, para. 5: The addition of this new text is a logical consequence of the additions in the new text of Art. 47. At a later stage, it might be appropriate to enhance the State parties’ cooperation with the Court as regards forfeiture, confiscatory measures, etc., in the light of the provisions in Art. 47, 58 and 59.

Art. 59, para. 6: Cf. *supra*, comments on Art. 59 para. 4. The second sentence confirms the right of any prisoner to take steps with a view to having his sentence reviewed. The provision that the administering State shall not prevent nor impede the prisoner from exercising this right applies, of course, too, to any application a prisoner may make under Art. 60, para. 3, *infra*.

Art. 59, para. 7: The application by analogy of the “speciality rule” generally agreed to in extradition matters appears to be all the more justified in cases of enforcement of sentences of the Court as the administering State is expected merely to enforce the sentence as pronounced by the Court and as the consent of the person concerned is not required (contrary to what happens when there is a transfer of a sentenced person from one State to another, *supra*).

Article 60

- 1. The administering State shall not release the prisoner before the expiry of the sentence as pronounced by the Court.**
- 2. The Court alone shall have the right to decide on the release of a prisoner before the expiration of the sentence and determine the conditions and effects of the release. The decision shall be taken by a Chamber of five judges.**
- 3. The prisoner may apply to the Court for a decision according to paragraph 2.**

Reasons for the changes:

The new text of Art. 60 is consistent with, and confirms, the general rule in Art. 59, para. 4, according to which the administering State shall enforce the sentence as pronounced by the Court. For this reason, pardon and/or amnesty enacted in the administering State as well as any regulations there concerning early release, such as parole, and commutation of sentences cannot automatically apply to a prisoner serving there a sentence pronounced by the Court. It is for the Court, and the Court alone, to decide whether any such grounds shall be taken into account for a prisoner's release before the expiry of the sentence as pronounced by the Court. Any application submitted by the prisoner to the Court to that effect will be decided upon in accordance with the second sentence of para. 2. of this Article. Cf. comments on Art. 59, para. 4 and para. 6.

...

PART 9. FINAL CLAUSES**Article 61
Reservations**

Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it reserves the right:

- (a) not to accept Art. 26, paragraph 1, (c).**
- (b) to allow on-site investigations only with its consent.**

Reasons for the changes:

Art. 26 para. -1 (c) allows “on-site investigations” of the Prosecutor without consent of the national State party concerned. This is an adequate means for an international body which necessarily encroaches upon national sovereignty. Nevertheless, some States may have reasons for making one of the reservations under art. 61.

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